Victoria’s “October surprises” in building reforms: not letting a crisis go to waste?

***Dr Matthew Bell*** *MELBOURNE LAW SCHOOL*

# The “most significant reform to building industry regulation in decades”?

During October 2024, many people in the Australian construction industry were understandably focused on events including the elections in the United States and Queensland. At that same time, however, changes claimed to be “the most significant reform to building industry regulation in decades” were being announced in Victoria under the broader banner of a multi-pronged program designed to address the widely-perceived crisis in affordable housing across the state.[[1]](#endnote-1) That broader program includes several other, and by no means uncontroversial, measures including fast-tracking of apartment planning approvals near suburban transport hubs and stamp duty concessions.[[2]](#endnote-2)

The announcements – mainly by the Premier, the Planning Minister and the head of the Victorian Building Authority (“VBA”) – covered a raft of issues of relevance to the construction industry, including:[[3]](#endnote-3)

* Security of payment
* Domestic building insurance, potentially leading to “decennial liability insurance”
* Developer bonds.

Many of these reforms had already been foreshadowed, including via several reports issued in late 2023.[[4]](#endnote-4) They also may be seen as reflecting an element of “playing catchup” with other states – albeit to be welcomed from the point of view of national harmonisation – after a period of relative dormancy in Victoria. These include the first-resort residential building insurance available in Queensland,[[5]](#endnote-5) security of payment reforms in WA (largely in line with John Murray AM’s 2017 recommendations)[[6]](#endnote-6) and the suite of reforms in NSW brought in to address the endemic quality issues exemplified by high-profile failures such as the need to evacuate the residents of the newly-completed Opal Tower on Christmas Eve 2018.[[7]](#endnote-7)

One change which had not been widely expected (at least, until the VBA’s Board was disbanded in March 2024) was the replacement of the VBA with a new regulator, the Building and Plumbing Commission (“BPC”). The BPC is intended to be “a new one-stop shop” which is proposed to absorb not only the VBA’s current remit in practitioner registration and regulatory overview but also the dispute resolution function within Domestic Building Dispute Resolution Victoria, the Victorian Managed Insurance Agency’s remit in relation to domestic building insurance (“DBI”), and Consumer Affairs Victoria’s responsibility for domestic building contracts.[[8]](#endnote-8)

This is the sort of reform which a Sir Humphrey Appleby might counsel his Minister as being “very brave”, especially given that the VBA itself rose from the ashes of the Victorian Building Commission barely a decade ago. But, by explicitly siting these building-related reforms in the context of the housing crisis in Victoria (and, beyond), the Victorian government has – rightly, in my view[[9]](#endnote-9) – signalled that a step change in delivery of quality housing cannot be achieved without firmly grasping the nettle of holistic construction regulatory reform.[[10]](#endnote-10)

This article seeks to highlight some aspects of the proposed reforms which all construction lawyers and their clients will need to be aware of. As is inevitable, however, this article can only be a snapshot view of a “moveable feast” as at the end of October 2024. At this time, we were still waiting to hear about:[[11]](#endnote-11)

* The government’s response to the review of the *Domestic Building Contracts Act 1995* (Vic): the Discussion Paper for that review signalled an appetite for considering changes across that regime including to key monetary thresholds and whether greater flexibility should be allowed in relation to cost escalation and other matters.[[12]](#endnote-12)
* The third and final stage of the Building System Review led by the Expert Panel on Building Reform, which is expected to lead to a redrafting of the Victorian suite of building-related legislation (a project which is already underway in NSW);[[13]](#endnote-13) the second stage report, released in 2023, had made a number of significant recommendations including adoption of the statutory duty of care for economic loss which had been introduced in NSW in 2020.[[14]](#endnote-14)

# The new Building and Plumbing Commission and its “watchdog” powers

As at late October 2024, the only detail available as to the specific role and powers which the BPC is likely to have when it arrives in mid-2025 is via announcements by the VBA and by the government.[[15]](#endnote-15) They are, however, said to be a “game changer” and to include (numbering added and combining quotes from the announcements):

1. A new rectification order power to allow the regulator to act against a builder after the occupancy permit is issued. …
2. Compelling developers of apartment buildings above three storeys to notify the regulator before a building is occupied, so the regulator can conduct a final inspection. … New powers will also enable the watchdog to stop apartments with serious defects from being sold, as well as increased reporting requirements before occupancy certificates are signed off on new builds.
3. Apartment owners will be better protected with a strata bond introduced for mid- to high-rise apartment buildings. This ensures funds are available to rectify defects after the occupancy permit is issued. … The new bond will be the first step towards introducing a new 10-year insurance product for apartment buildings…
4. DBI will be expanded to respond when a builder has failed to comply with the new rectification order. This means the builder no longer must be insolvent, disappear, or die before a claim can be made.

Items 1-2, as described here, sound akin to measures which have been implemented in NSW under the reform program administered by the recently-retired Building Commissioner David Chandler OAM (now replaced by James Sherrard) under (primarily) Part 5 Div 1 of the RAB Act. There is resonance in the announcements also with practical measures recently adopted in NSW: the “inspection blitz, including a crackdown on unregistered building and plumbing work”[[16]](#endnote-16) may be expected to rest upon powers similar to the “anywhere, anytime” inspections, leading to issue of rectification orders, introduced in 2023 into Part 3B of the *Home Building Act 1989* (NSW).

In relation to item 3, the recommendation by the Building System Review Stage 2 report to introduce a developer bond scheme suggested explicitly that it be based upon the one in NSW.[[17]](#endnote-17) It may therefore be expected to mirror that under Part 11 Div 3 of the *Strata Schemes Management Act 2015* (NSW) and Part 8 Div 3 of the *Strata Schemes Management Regulation 2016* (NSW). There, the bond is to be for 2% of the contract price (increasing to 3% for bonds given after 1 July 2025) and to be held for up to three years after the occupancy certificate.[[18]](#endnote-18) The second aspect, decennial liability insurance, was the subject of chapter 6 of the Stage 2 report, leading to its recommendation – apparently sensitive to the reality that insurance is a global enterprise over which even state governments have limited influence – for a staged introduction of the new scheme guided by an advisory committee.[[19]](#endnote-19) Thus, it appears that again the Victorian intention is to learn from the experience in NSW which in this case led to legislative reforms in 2023.[[20]](#endnote-20)

Item 4 appears to foreshadow an amendment to the relevant Ministerial Order to expand the triggers for indemnity to include where a rectification order has not been complied with.[[21]](#endnote-21) This was not the subject of a recommendation in the Stage 2 report, so this is very much an area where its effectiveness will rest on the efficacy of the rectification order process dovetailing with sufficient resources (by way of premium pool and administration) within the BPC as the “one stop shop”. Given that the deficiencies of the current “last resort” scheme – exacerbated in the wake of the collapse of Porter Davis and other high-profile builders – are very well known,[[22]](#endnote-22) it is to be hoped that this reform, in concert with others, will lead to significant enhancement of consumer protection.

# Security of payment: the prodigal state returns?

The previous discussion of the prospects for effective reform of the Victorian DBI scheme foreshadowed the need for any such reforms to dovetail with others which are designed to avoid builders falling into a situation where the insurance needs to be called upon. Prominent amongst these causes of incomplete or defective work (along with the incompetence and gamesmanship which will always be present) is “the very lifeblood” of the industry: cashflow.[[23]](#endnote-23) It is therefore appropriate that the Victorian government’s response to the 2023 Parliamentary Inquiry on security of payment reform also was tabled in October 2024,[[24]](#endnote-24) and that it expressly acknowledged the nexus between improving payment practices and “a building and construction industry that is better placed to improve housing supply”.[[25]](#endnote-25)

The response’s overarching virtue is that it raises the prospect of bringing Victoria into line with other states, especially in its abandonment (via its *recommendation 2*) of the ambiguous policy and drafting comprising the so-called “excluded amounts” regime.[[26]](#endnote-26) This was introduced in 2006 and remains unique to Victoria. It has been suspected to be a culprit in adjudication having relatively low usage in Victoria compared to other states, and its proposed removal was immediately welcomed by several prominent construction lawyers, noting the benefits not just for claimants but also for respondents who have not been able to set off liquidated damages in payment disputes under the Victorian Act.[[27]](#endnote-27)

The Inquiry had made 28 recommendations, of which the response supported 16 in full, two in part and 10 in principle. In essence, the adopted recommendations are largely based upon bringing Victoria’s Act more closely into line with the NSW and WA legislation, including by:

* removing the concept of “reference dates”, as has been done in NSW (*recommendation 3*): the wisdom of this change is confirmed by recent caselaw reflecting that the application of the concept continues to cause unnecessary confusion[[28]](#endnote-28)
* amending the “business days” definition to suspend time running under the Act during the traditional industry shutdown from 22 December to 10 January (*recommendation 4*): whilst the response noted this to be “uncontroversial” because it stops Victoria being an national outlier (and no doubt will be welcomed by anyone who has had to respond to a payment claim or adjudication application during their Christmas holidays), it should nonetheless be recognised that the amendment, by reducing the possibility of “ambush” claims, removes a key aspect of the reversal of the privilege of non-payment which was part of the original intention of the legislation[[29]](#endnote-29)
* mandating that contracts cannot provide for more than 25 business days after the claim for payment of claims under the Act (*recommendation 8),* supplementing the existing provision that, if the contract does not otherwise provide, payment is due 10 business days after the claim;[[30]](#endnote-30) this seems uncontroversial in the context of national harmonisation but again emphasises the norm-shifting ambitions of the legislation to override party autonomy in favour of cultural change[[31]](#endnote-31)
* the possibility that notice-based time bar clauses (*recommendation 5*) or otherwise unfair terms identified by regulation (*recommendation 6*) may be rendered ineffective: this is derived from the *WA SOP Act* (respectively, its ss 16 and 15) and potentially represents a significant additional route (in addition to the recently-expanded unfair contract terms regime under the Australian Consumer Law)[[32]](#endnote-32) to challenging onerous (but, potentially justifiable) contract terms; it will therefore be instructive to keep track of consideration of these provisions as they come before the courts in WA, especially given the potential for conflict between the ACL and security of payment regimes.

Amongst the recommendations for which the government offered support in principle:

* it deferred to the review of the *Domestic Building Contracts Act*[[33]](#endnote-33)the question of whether – as has happened in NSW, Tasmania and WA – the Act should apply more widely to residential building contracts between the owner and builder (recommendation 10) - there is currently a complicated system of gateways based upon whether the owner is “in the business of building residences”;[[34]](#endnote-34) this deferral seems appropriate given the interplay between the payment timings under the two Acts and also the critical need for consumer information if those processes are to be dovetailed
* in relation to cascading statutory trusts (recommendation 27) and retention trusts (recommendation 28), the government signalled a desire for more information about the experience in other states before committing to reforms; this seems a sensible response to the fact that the “jury remains out” on whether these mechanisms are an effective part of the broader scheme to promote cashflow.[[35]](#endnote-35)

# Has the crisis been wasted?

The title of this article incorporates a quote attributed – seemingly, without basis except that it may be seen to reflect a stoic view, forged by his unequalled experience, of political expediency – to Winston Churchill. It suggests that we should judge the likely success of the proposed Victorian reforms by the low bar of whether they avoid wasting the “crisis” by at least “doing something”. That is indeed too low a bar for such ambitious and extensive reforms, many of which (including the moves towards security of payment harmonisation) have been worked on by many members of our construction law community for well over a decade.[[36]](#endnote-36)

In my 2023 *Monash University Law Review* article, I laid out in some detail the reasons why I think that effective regulatory reform in the construction sphere can be measured by reference to six design principles:[[37]](#endnote-37)

1. occupant health and safety is paramount
2. prevention is better than cure
3. risk and control are the foundation for standards-setting and decision making
4. industry-based norms are to be harnessed, consistent with the regulatory goal
5. vulnerability sets the boundary for legislative intervention
6. the “buck” should stop somewhere.

In my view, the manner in which the reform proposals have been released, and the detail so far available in relation to them, ticks a number of the boxes across these six principles. One of the most impressive elements, to my mind, was that the announcement of the shift to the new regulator was accompanied by a report commissioned by the VBA and authored by Bronwyn Weir,[[38]](#endnote-38) who has been at forefront of reform programs across Australia since she and Peter Shergold AC published their *Building Confidence* report for the Building Ministers’ Forum in 2018.[[39]](#endnote-39) October’s Weir report gave stark insights into the angst faced by consumers in the residential construction sphere by reference to seven case studies. Its findings underpinned a powerful statement from the VBA CEO and Commissioner, Anna Cronin, where she apologised for past failings and was explicit that “Victorians should expect nothing less than buildings that are safe to occupy, compliant with legislation and regulations and built to last.”[[40]](#endnote-40)

These actions show a strong intent towards satisfying *principles 1, 2 and 6* of the list above; indeed, Cronin’s acceptance of responsibility along with her support of the new integrated regulator speaks particularly strongly to *principle 6*. However, as anyone who has followed regulatory reforms in the construction industry knows, actions speak immeasurably louder than words. The complexities involved in construction regulation, including its deeply-rooted vested interests, mean that striking an appropriate balance in the wording and processes of the reforms remains a fraught task, especially given the nuance underpinning *principles 3-6*.

It is to be hoped, however, that everyone who has a hand in the reforms’ implementation – whether as policymakers, practitioners or the broader community – remains motivated by knowledge of what can happen when building regulation fails. The Grenfell Tower Inquiry’s Phase 2 Report provided a devastating reminder of the consequences of catastrophic failure when it was published in September;[[41]](#endnote-41) the Weir report has now given compelling insights into the everyday reality faced by so many people living with defective or incomplete work in their homes across Victoria:

the experience these complainants have had in their interactions with building practitioners, the VBA, other building regulators and the legal system has been appalling. To say that each and every one of them has suffered and continues to suffer significant financial, emotional and health issues is an understatement. … They have put their lives on hold, not knowing what the outcome will be, how they will pay to rectify defects and/or complete their homes, and when the costs they are paying will end.[[42]](#endnote-42)

# *A person wearing glasses and a v-neck sweater Description automatically generated****Dr Matthew Bell***

*Associate Professor and Co-Director of Studies for Construction Law, Melbourne Law School, The University of Melbourne*

# Endnotes

1. “A New Regulator with New Powers” https://www.vba.vic.gov.au/consumers/a-new-regulator-with-new-powers. [↑](#endnote-ref-1)
2. The political context of these reforms was summarised, for example, by Brendan Coates, Matthew Bowes and Kat Clay, “Housing Policy Heats Up” (Grattan Institute podcast, 28 October 2024). The stamp duty reforms are the subject of the Duties Amendment (More Homes) Bill 2024 (Vic), introduced to Parliament on 29 October 2024. [↑](#endnote-ref-2)
3. The announcements can be found via https://www.premier.vic.gov.au/. [↑](#endnote-ref-3)
4. See Department of Government Services Victoria, “Issues Paper: Review of Domestic Building Contracts Act 1995” (2023); Victoria, *Building Reform: Paper Two* (2023); Victorian Parliament Environment and Planning Committee, *Report on the Inquiry into Employers and Contractors Who Refuse to Pay their Subcontractors for Completed Works* (2023). [↑](#endnote-ref-4)
5. The Queensland Home Warranty Scheme is currently the only state-based scheme which is “first resort”; Victoria, for example, allows for indemnity to be triggered only where the builder dies, becomes insolvent or disappears: *Domestic Building Insurance Ministerial Order* (Victoria Government Gazette No S95 28 February 2024) cls 8(3) and 8(4). [↑](#endnote-ref-5)
6. *Building and Construction Industry (Security of Payment) Act 2021* (WA) (“*WA SOP Act*”). [↑](#endnote-ref-6)
7. These reforms were primarily via the enactment of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) (“*RAB Act*”) and *Design and Building Practitioners Act 2020* (NSW) (“*DBP Act*”). See, eg, Alex Ottaway, “Design and Building Practitioners Act 2020 (NSW): Can Disputes Alleging Breach of Duty be Settled?” (2021) 32(3&4) *ACLB* 18. [↑](#endnote-ref-7)
8. See “A New Regulator…” (above n 1). [↑](#endnote-ref-8)
9. See Matthew Bell, “Bringing Home Reform: A Principles-Based Approach to Regulation of Construction for Residents’ Safety”(2023) 49 *Monash University Law Review* 82. [↑](#endnote-ref-9)
10. See “New Building Watchdog with Teeth to Protect Victorians”: <https://www.premier.vic.gov.au/new-building-watchdog-teeth-protect-victorians>. [↑](#endnote-ref-10)
11. For a critical summary see, eg, Megan Thorburn, Bronwyn Weir and Matthew Bell, “Boulevards of Broken Dreams” *Law Institute Journal* (March 2024) 18. [↑](#endnote-ref-11)
12. Department of Government Services (above n 4). [↑](#endnote-ref-12)
13. The ambition for a new Victorian Building Act remains stated on the Building System Review website: <https://www.planning.vic.gov.au/guides-and-resources/building-policy/building-reform>. The proposed NSW Building Bill and associated legislation to consolidate its suite was the subject of a consultation launched in August 2024: see https://eaxchange.engineersaustralia.org.au/buildingreform/discussion/consultation-on-proposed-building-reforms-in-nsw. [↑](#endnote-ref-13)
14. *DBP Act* s 37. See *Building Reform: Paper Two* (above n 4) [4.4.3] p 17. [↑](#endnote-ref-14)
15. “A New Regulator…” (above n 1); “New Building Watchdog…” (above n 10); Building System Review (above n 13). [↑](#endnote-ref-15)
16. “New Building Watchdog…” (above n 10). [↑](#endnote-ref-16)
17. *Building Reform: Paper Two* (above n 4) [4.3.2] p 16. [↑](#endnote-ref-17)
18. *Strata Schemes Management Regulation 2016* (NSW) regs 52, 54. [↑](#endnote-ref-18)
19. *Building Reform: Paper Two* (above n 4) [6.3.1] p 32. [↑](#endnote-ref-19)
20. See *Strata Schemes Management Act 2015* (NSW) pt 11 div 3AA, *Strata Schemes Management Regulation 2016* (NSW) pt 8 div 3A. [↑](#endnote-ref-20)
21. See above n 5 for the current terms of that Order. [↑](#endnote-ref-21)
22. See, eg, Thorburn et al (n 11). [↑](#endnote-ref-22)
23. *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* (1973) 71 LGR 162, 167 (Lord Denning MR). [↑](#endnote-ref-23)
24. Though the report and response relates almost entirely to the *Building and Construction Industry Security of Payment Act 2002* (Vic) (“*Vic SOP Act*”), the report’s title is somewhat opaque as to that being the intent (*Report on the Inquiry into Employers and Contractors…*: above n 4). [↑](#endnote-ref-24)
25. Ibid p 2. [↑](#endnote-ref-25)
26. Primarily by way of *Vic SOP Act* ss 10-10B; see, eg, Sean Kelly, Julian Bailey and Matthew Bell, “Statutory adjudication in Australia” in Renato Nazzini (ed), *Construction Arbitration and Alternative Dispute Resolution: Theory and Practice Around the World* (Informa, 2022) pp 267-269. [↑](#endnote-ref-26)
27. Andrew Stephenson, Joseph Barbaro, Jey Nandacumaran and Robert Kalenderian, “Victorian Government Endorses Recommendations to Amend Security of Payment Act” (23 October 2024): https://www.corrs.com.au/insights/victorian-government-endorses-recommendations-to-amend-security-of-payment-act. [↑](#endnote-ref-27)
28. See, eg, *Babicka v ASD Corporation Aust Pty Ltd* [2024] VSC 587 and *Dickson Developments Precinct 5 Pty Ltd v Core Building Group Pty Ltd* [2024] FCA 86 (on the equivalent ACT legislation before the concept was removed from it). [↑](#endnote-ref-28)
29. Philip Davenport, *Adjudication in the Building Industry* (3rd ed, Federation Press, 2010) p 3. [↑](#endnote-ref-29)
30. *Vic SOP Act* s 12. [↑](#endnote-ref-30)
31. See, eg, the description of the UK *Housing Grants, Construction and Regeneration Act 1996* (UK) – the antecedent to the Australian legislation – as a “whirlwind hitting the industry”: Rupert Jackson, Nicholas Higgs and Hannah Fry, “The TCC and the Housing Grants, Construction and Regeneration Act 1996” in Peter Coulson and David Sawtell (eds), *The History of the Technology and Construction Court on its 150th Anniversary* (Hart Publishing, 2023) p 133. [↑](#endnote-ref-31)
32. See, eg, Juliana Jorissen, Katherine Vines, Jordana Sisarich and Su-En Hia, “Building fairness - updates to the unfair contracting terms regime and how to avoid unfair terms in standard form construction contracts” (2024) 33(5&6) *ACLB* 36. [↑](#endnote-ref-32)
33. See n 4 above. [↑](#endnote-ref-33)
34. *Vic SOP Act* s 7(2)(b). See Jos Mulcahy, “The Victorian security of payment legislation — when is a residential owner in the business of building residences?” (2024) 33(7) *ACLB* 50. [↑](#endnote-ref-34)
35. There remains a view – though, for now, perhaps just a pipedream – that innovations such as blockchain might offer a more sustainable solution for ensuring timely payment: see, eg, Salar Ahmadisheykhsarmast and Rifat Sonmez, “A Smart Contract System for Security of Payment of Construction Contracts” (2020) 120 *Automation in Construction* 103401. [↑](#endnote-ref-35)
36. See, eg, Society of Construction Law Australia, “Report on Security of Payment and Adjudication in the Australian Construction Industry” (2014). [↑](#endnote-ref-36)
37. Bell (above n 9) pp 86-88. [↑](#endnote-ref-37)
38. Bronwyn Weir and Frances Hall, “Victorian Building Authority – The Case for Transformation” (October 2024). [↑](#endnote-ref-38)
39. “Building Confidence: Improving the Effectiveness of Compliance and Enforcement Systems for the Building and Construction Industry Across Australia” (2018). [↑](#endnote-ref-39)
40. https://www.vba.vic.gov.au/news/news/2024/statement-from-vba-ceo-and-commissioner-anna-cronin. [↑](#endnote-ref-40)
41. Grenfell Tower Inquiry, *Phase 2 Report of the Public Inquiry into the Fire at Grenfell Tower on 14 June 2017* (HMSO, 2024). [↑](#endnote-ref-41)
42. Weir and Hall (above n 36) p 9. [↑](#endnote-ref-42)